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No. 528

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JAMES R. BROWNING, Clerk

In The Supreme Court of The United States

October Term, 1958

NORRIS EDWARD BASS
doing business as
N. E. BASS,
Gladys, Virginia,
Appellant

v.

UNITED STATES OF AMERICA
INTERSTATE COMMERCE COMMISSION
ATLANTIC GREYHOUND CORPORATION
CAROLINA COACH COMPANY, Inc.
EASTERN GREYHOUND LINES
RICHMOND GREYHOUND LINES, Inc.
VIRGINIA STAGE LINES, Inc.
Appellees

On Appeal From The United States District Court for
The Western District of Virginia
Lynchburg Division

JURISDICTIONAL STATEMENT

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P. O. Box 859
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Opinion Below

The opinion of the Three-Judge District Court in this case is reported at 163 Fed. Supp. 1 and the case is entitled *Norris Edward Bass* v. *United States of America and The Interstate Commerce Commission, et al.* A copy of the opinion is attached as Appendix A. The case was *Docket No. MC-116215, Norris Edward Bass Contract Carrier Application* before the Interstate Commerce Commission and a copy of the report of the Commission is attached as Appendix B.

STATEMENT

Congress, under authority of Article 1, Section 8, of the Constitution of the United States of America has provided that the public shall have two classes of passenger service by motor vehicle; one class is a common carrier by motor vehicle, which class of carrier is to operate under a certificate, 49 U.S.C. 306 and 307, and is to transport passengers and property for the general public for compensation, 49 U.S.C. 303 (14), but is not to operate as a contract carrier, 49 U.S.C. 303 (15).

The other class is a contract carrier by motor vehicle, which class of carrier is to operate under a permit, 49 U.S.C. 309(b), and can only transport passengers or property in interstate or foreign commerce under individual contracts or agreements for compensation, 49 U.S.C. 303(15). Congress made a distinction between a common carrier and a contract carrier as to the kind of service each is to render and as to the character of proof necessary for each to adduce to obtain authority to engage in operation. Section 209(b) of the Interstate Commerce Act, 49 U.S.C. 309(b), specifically directs that the Interstate Commerce Commission shall issue a permit to any qualified applicant if it appears that the applicant is fit willing and able to properly conduct the proposed service and that the proposed service will be consistent with the public interest and the National Transportation Policy.

Congress provided that it shall be the duty of the Interstate Commerce Commission to regulate common carriers by motor vehicle, 49 U.S.C. 304(1), and to regulate contract carriers by motor vehicle, 49 U.S.C. 304(2), and to do so by fair and impartial regulation of all modes of transporta-

tion, so administered as to recognize and preserve the inherent advantage of each (see National Transportation Policy).

Norris Edward Bass filed with the Interstate Commerce Commission, under the provisions of the Interstate Commerce Act and in accordance with the rules and regulations of the Commission, an application seeking a permit from the Commission authorizing him to conduct operation as a contract carrier by motor vehicle transporting passengers under individual contracts or agreements in Interstate Commerce.

The Interstate Commerce Commission denied the application of Bass and Bass brought civil action before the District Court of three Judges under the provisions of 28 U.S.C. 2325 to set aside the order of the Commission and to remand the case to the Commission. The District Court denied the petition for injunction.

The opinion of the District Court of three Judges is dated June 30, 1958 and the opinion and order were entered of record on July 11, 1958. Notice of appeal was filed on September 5, 1958 in the District Court of the United States for the Western District of Virginia, Lynchburg Division. The notice was served upon all parties of record as evidenced by the certificate of service of plaintiff affixed to the notice. The District Court, on October 31, 1958 enlarged the time to docket the case in the Supreme Court to November 20, 1958 and notice thereof was served upon all parties.

JURISDICTION

A direct appeal from a District Court of three Judges to the Supreme Court of the United States is allowed plaintiff by 28 U.S.C. 1253. This section follows:

> "That any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by an Act of Congress to be heard and determined by a District Court of three judges."

This proceeding was required to be heard by a District Court of three Judges, 28 U.S.C. 2325.

STATUTES INVOLVED

Pertinent provisions of the Interstate Commerce Act are set forth in Appendix C.

THE QUESTIONS

The questions presented by this appeal for the Supreme Court to determine and supply the answers are:

1. Can a common carrier operating under a certificate render passenger service as a contract carrier as defined in 49 U.S.C. 303(15) in view of the plain prohibition in 49 U.S.C. 303(15) against common carriers defined in 49 U.S.C. 303(14) rendering contract carrier service?

2. Since a contract carrier is any person other than a common carrier who engages in interstate operation under individual contracts or agreements, 49 U.S.C. 303(14, 15), and since a common carrier is any person who engages in operation for the general public for compensation, can the District Court join together contract carriers and common carriers and treat them as one and the same when Congress divorced them and described the field of operation of each?

3. Can the District Court substitute its judgment for the plain language of the Act providing for passenger service by a contract carrier under a permit (49 U.S.C. 309[b]) and passenger service by a common carrier under a certificate (49 U.S.C. 306 and 307)?

4. Did Congress provide, as the Court held, "that when an application is made for a permit to furnish contract service in an area already served in that fashion by common carriers, the Commission has the duty to determine whether the existing contract service is adequate and whether the additional proposed service will be inconsistent with the public interest and the National Transportation Policy"?

5. Did not Congress provide for passenger service both by contract carriers by motor vehicle and by common carriers by motor vehicle notwithstanding the adequacy or inadequacy of the service of each other?

6. Did Congress, in adopting the National Transportation Policy include within that Policy passenger service by a contract carrier under Sections 203(15) and 209(b) of the Interstate Commerce Act (49 U.S.C. 303[15] and 309[b])?

7. Did not Congress mean, in laying down its National Policy, that the Commission is compelled to allow duplicate passenger service by one who offers passenger service as a contract carrier under individual contracts or agreements, notwithstanding the existence of "special or chartered parties" service by common carriers?

8. Can the Commission deny an application for authority to conduct passenger service as a contract carrier because it concluded that passenger service proposed to be conducted by a contract carrier is not essentially different from the service offered and afforded by common carriers?

9 Can the Court and the Commission read into the Act to regulate commerce a provision that contract carrier service must be denied because it resembles the service of a common carrier when the Act to regulate commerce clearly distinguishes between the two classes of carriers?

10. Can the Interstate Commerce Commission in considering an application for a permit disregard the inherent advantages of passenger service rendered by a contract carrier over the passenger service rendered by a common carrier?

11. Can the Interstate Commerce Commission disregard the plain language of 49 U.S.C. 309(b) and deny the application of Bass when it is provided that the Commission shall grant a permit to any qualified applicant for authority to conduct passenger service as a contract carrier under individual contracts or agreements?

12. Can the Interstate Commerce Commission, under the Act, deny Norris Edward Bass a permit authorizing him to conduct passenger service as a contract carrier by motor vehicle of passengers for compensation under individual contracts or agreements when contract carrier service by motor vehicle is not available and the report of the Commission shows from the record that there is a need for passenger service by a contract carrier?

13. Is operating a school bus within a single state under a contract with a state government transporting school children to and from school such operation as to make the operator thereof engaged in transportation as a regular occupation or business so as to preclude him from making casual, occasional or reciprocal trips transporting passengers by motor vehicle in interstate commerce without a permit?

14. Is passenger service rendered by a common carrier and by a contract carrier one and the same service in accordance with the Act to regulate commerce?

15. Can the District Court merge passenger service by common carriers and contract carriers when Congress completely divorced these two classes of service or carriers?

STATEMENT OF THE CASE

The Interstate Commerce Commission denied the application of Norris Edward Bass for a permit authorizing him to conduct passenger service as a contract carrier by motor

vehicle for compensation as authorized by 49 U.S.C. 309. In considering the evidence of record, the report of the Commission shows that:

> "Other carriers (common carriers) have been utilized for these trips, but due to extra charges for side trips and the inflexibility of the operation once contracts have been arranged, their (common carriers) service has not been as satisfactory as that of applicant" (Bass) and "The minister (a colored preacher) has utilized applicant's (Bass') service for approximately six years, has found it to be satisfactory * *. His satisfaction stems from applicant's (Bass') congeniality and willingness to accommodate individual desires and needs of his passengers."

The proposed passenger service of applicant is purely a service of a contract carrier by motor vehicle (49 U.S.C. 303[15]) as distinguished from passenger service of a common carrier by motor vehicle (49 U.S.C. 303[14]). Nevertheless, the Commission, after finding that the service of common carriers by motor vehicle has not been as satisfactory as that of Bass, concluded that:

> "The proposed service is not essentially different from that offered and afforded by the opposing motor common carriers. We are unable, therefore, to agree with applicant's contentions (1) that the proposed service is that of a contract carrier, and (2) that since only common carrier service is now available, a grant of the application would be consistent with the public interest and the National Transportation Policy."

The Interstate Commerce Act, 49 U.S.C. 307, definitely provides for passenger service by a common carrier by motor vehicle and after providing for a passenger service by common carriers, Congress then specifically provided for passenger service by a contract carrier, 49 U.S.C. 309. Therefore, it is clear that the Commission has failed to recognize the inherent advantages of passenger service by a contract carrier

over the passenger service of a common carrier by motor vehicle and the specific provisions of the Interstate Commerce Act. We quote from *Schaffer Transportation* v. *U. S.*, 355 *U. S.* 83, as follows:

> "The Supreme Court, Mr. Chief Justice Warren, held that determination by the Interstate Commerce Commission in denying the application on ground that railroad's service presently available was reasonably adequate and that witnesses' main purposes in supporting the application was to obtain lower rates rather than improved service, was improper for failure to evaluate inherent advantages of motor service proposed."

A look at the report of the Commission will show the application of Bass was denied because, contrary to the Act, the Commission held that:

> "The supporting witnesses have presented no evidence to indicate that the group transportation desired by them cannot be performed by those common carriers under the Commission's rules and regulations as set forth in the Chartered Party Service Case Supra."

The Commission compared the proposed passenger service of a contract carrier with the chartered party service of a common carrier, and in so doing, the Commission ignored the advantages of contract carrier service over common carrier service (*see Schaffer Transportation Case Supra*) and the plain provisions of 49 U.S.C. 303(14, 15), 306, 307 and 309. Moreover, the Commission required Bass to tender proof in support of his application different from that required in 49 U.S.C. 309. Bass, under 49 U.S.C. 309, is required, before a permit will issue, to show that he is fit, willing and able to perform the proposed service and that the proposed service will be consistent with the public interest and the National Transportation Policy. This proof Bass tendered and since there is no passenger service by motor vehicle available or authorized by the Commission to be

rendered by a contract carrier under a permit, the proposed service is not only in the public interest but is specifically required to be granted by 49 U.S.C. 309(b).

The next proposition is: does Bass' operation wholly within Virginia under contract with the Commonwealth of Virginia, transporting school children to and from school make him engaged in transportation as an occupation or business? This operation is specifically exempt from regulation by the Interstate Commerce Commission, as the Interstate Commerce Act, 49 U.S.C. 302(b), provides that nothing in this part (Part II, Interstate Commerce Act) except the provisions of Section 204 relative to qualification and maximum hours of service * shall be construed to include motor vehicles employed solely in transporting school children and teachers to and from school in interstate commerce. Then, 49 U.S.C. 302(b) provides that nothing in this part (Part II, Interstate Commerce Act) shall be construed to authorize a motor carrier to do an intrastate business on the highways of any state or to interfere with the exclusive exercise by each state of the power of regulation of intrastate commerce.

The Commission held that Bass' operation from Virginia to points in several states did not come within the exemption provisions of 49 U.S.C. 303 (21) (b) (a) allowing him to make casual, occasional and reciprocal trips out of Virginia transporting passengers for compensation. The District Court erroneously sustained the Commission.

THE QUESTIONS ARE SUBSTANTIAL

The questions presented by this appeal are unique in that the Commission has never granted, to our knowledge, a permit to a contract carrier authorizing passenger service to be performed by a contract carrier, notwithstanding the fact that the Interstate Commerce Act has been in effect for over 20 years and that the Act, 49 U.S.C. 309, specifically authorizes the issuance of permits to contract carriers authorizing them to transport passengers. Congress, in 49 U.S.C. 303(14) and (15) specifically distinguished these two classes of carriers but the Commission and the District Court have

failed to recognize and apply that distinction but consider passenger service rendered by contract carriers and common carriers to be the same service. A determination of this problem is warranted in the administration of the Act which Act provides for passenger service by a contract carrier and the Interstate Commerce Commission has failed to provide passenger service by a contract carrier. But, the Interstate Commerce Commission recognizes that there is a difference between the service and operation of a contract carrier of property and the service and operation of a common carrier of property. The Commission goes one step further and gives actual effect to the difference between these carriers by granting applications for permits to conduct operation as contract carriers of property and certificates to conduct operation as common carriers of property. If the Act authorizes contract carriers of property, it also authorizes contract carriers of passengers as the authority for both operations, passenger and property by contract carriers, is found in the same Act and the same Section, 49 U.S.C. 309 and 49 U.S.C. 303(15). Consequently, if service by contract carriers of property can be authorized and is granted by the Commission notwithstanding the similarity of that service with the service of a common carrier of property, then the decision of the Court and the Commission is arbitrary and capricious. These issues can only be determined by this Honorable Court. The appeal should be actually heard. The importance of the problem in the administration of the Interstate Commerce Act is sufficient for this Honorable Court to decide the issues (see *Smith* v. *Hoboken R. R. et al*, 328 *U. S.* 123).

Then, too, the Interstate Commerce Commission operates in a field limited by constitutional rights and legislative requirements (see *Atchison, T. & S. F. R. Co.* v. *U. S.*, 284 *U. S.* 284) and its rules and orders must be confined to the obvious purposes and directions of the Interstate Commerce Act (see *Texas & P. R. Co.* v. *I.C.C.*, 162 *U. S.* 197). In this proceeding, the Commission has not confined its action to the purpose and direction of the Act regulating carriers as it has disregarded 49 U.S.C. 309 and the National Transportation Policy. Congress directed two classes of passenger service by motor carriers, one a passenger service by common carrier

(49 U.S.C. 303[14], 49 U.S.C. 306, and 49 U.S.C. 307), and the other a passenger service by contract carrier (49 U.S.C. 303[15] and 49 U.S.C. 309). The Commission and the Court have not followed the Act because both have put common carrier passenger service and contract carrier passenger service upon the same footing when, in fact, Congress made a distinction between the two classes of passenger service for the Interstate Commerce Commission and the Court to observe and the public to enjoy.

The District Court is in error in holding that when an application is made for a permit to furnish contract service in an area already served in that fashion by common carriers, the Commission has the duty to determine whether the existing contract service is adequate and whether the additional proposed service will be inconsistent with the public interest and the National Transportation Policy. The Court put passenger service by a contract carrier and passenger service by a common carrier upon the same footing when Congress specifically said that they are different kinds of service. Congress specifically provided for passenger service by a contract carrier under a permit (49 U.S.C. 309) and did so notwithstanding the fact it had previously provided for passenger service by a common carrier under a certificate of public convenience and necessity, 49 U.S.C. 306 and 49 U.S.C. 307. Congress did not provide that a common carrier could render passenger service as a contract carrier but did provide under 49 U.S.C. 308, as a term or condition of a certificate, that a common carrier by motor vehicle transporting passengers under a certificate issued under this part (Part II, Interstate Commerce Act) may transport in interstate or foreign commerce to any place "special or chartered parties" under such rules and regulations as the Commission may prescribe. The contract carrier service by a common carrier considered by the District Court and the Commission is not a service Congress said a common carrier under a certificate could perform, as Congress specifically limited the service of a common carrier to *special* or *chartered parties*, as distinguished from passenger service rendered under an individual *contract* or *agreement* by a contract carrier. It makes no difference what the service of a common carrier may be, still the public is entitled

to the inherent advantages of contract carrier service over the passenger service of a common carrier, *Schaffer Transportation* v. *U. S. Supra,* and the National Transportation Policy. In 49 U.S.C. 303(15), Congress made a clear distinction between the service of a contract carrier and that of a common carrier and the Commission and the Court cannot merge two different services which Congress has divorced and made independent of each other. A contract carrier is any person who performs service under an individual contract or agreement other than transportation performed by a common carrier described in 49 U.S.C. 303(14). Please see 49 U.S.C. 303(15) which specifically distinguishes the service of a contract carrier from the service of a common carrier. This distinction the District Court failed to recognize and the Commission ignored. For these reasons, among others, the questions presented are so substantial as to require plenary consideration, with briefs on the merits and oral argument for their resolution.

The appeal should be heard and the issues determined by this Honorable Court.

NORRIS EDWARD BASS

By: W. G. BURNETTE.
Counsel for Appellant

302 7th Street
P. O. Box 859
Lynchburg, Virginia
November 18, 1958.

CERTIFICATE OF SERVICE

I, W. G. Burnette, counsel for Norris Edward Bass, doing business as N. E. Bass, Gladys, Virginia, plaintiff-appellant herein, and a member of the Bar of the Supreme Court of the United States, having been admitted to practice on the 13th day of February 1947, hereby certify that on the 18th day of November, 1958, I served copies of the foregoing Juris-

dictional Statement of plaintiff-appellant on the severa parties of record in the District Court as follows:

1. On the United States, by mailing a copy in a duly ad dressed envelope, with postage prepaid, to:

Honorable John Strickler
United States Attorney
Western District of Virginia
Roanoke, Virginia.

To: The Solicitor General
Department of Justice
Washington 25, D. C.

To: Honorable Victor R. Hansen
Assistant Attorney General
Department of Justice
Washington 25, D. C.

To: James E. Kilday, Esq., Attorney
Department of Justice
Washington 25, D. C. and

To: E. Riggs McConnell, Esq., Attorney
Department of Justice
Washington 25, D. C.

2. On the Interstate Commerce Commission, by mailing a copy in a duly addressed envelope, with postage prepaid, to:

Honorable Robert W. Ginnane
Chief Counsel
Interstate Commerce Commission
Washington 25, D. C., and

To: Carroll T. Prince, Jr., Esq., Attorney
Interstate Commerce Commission
Washington 25, D. C.

3. On Atlantic Greyhound Corporation, Carolina Coach Company, Eastern Greyhound Lines, Richmond Greyhound Lines, Inc., and Virginia Stage Lines, Inc., intervening defendants, by mailing copies in duly addressed envelopes with first class postage prepaid, to their respective attorneys of record as follows:

L. C. Major, Jr., Esq.
Turney & Turney
2001 Massachusetts Avenue, N. W.
Washington 6, D. C., and

To: William C. Battle, Esq.
Perkins, Battle & Minor
Court Square Building
Charlottesville, Virginia.

Attorneys for intervening defendants.

W. G. BURNETTE, *Counsel for Norris Edward Bass*
302 7th Street (P. O. Box 859)
Lynchburg, Virginia

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA

Lynchburg Division,

June 30, 1958.

NORRIS EDWARD BASS, d/b/a N. E. BASS, Gladys, Virginia,
Plaintiff,

v.

UNITED STATES OF AMERICA
and
INTERSTATE COMMERCE COMMISSION,
Defendants

ATLANTIC GREYHOUND CORPORATION, CAROLINA COACH COMPANY, INC., EASTERN GREYHOUND LINES, RICHMOND GREYHOUND LINES, INC., and VIRGINIA STAGE LINES, INC.,
Intervening Defendants.

CIVIL ACTION No. 415

Before: SOBELOFF, Circuit Judge, and THOMPSON and BARKSDALE, District Judges.

Wilbert G. Burnette, for petitioner; E. Riggs McConnell (Victor R. Hansen and John Strickler on the brief) for the United States; Carroll T. Prince, Jr., (Robert W. Ginnane on the brief) for the Interstate Commerce Commission; and William C. Battle and Linwood C. Major, Jr. (Perkins, Battle & Minor and Turney & Turney on the brief), for the intervening defendants.

PER CURIAM:

This three-judge court was constituted, as required by Title 28 USCA, Sec. 2284, to hear and determine the plaintiff's petition, filed pursuant to Title 28 USCA, Sections 1336, and 2321-2325, seeking to set aside and annul an order of the Interstate Commerce Commission. The Commission had denied his application for a permit to operate in interstate commerce as a contract carrier by motor vehicle in charter service between points in Virginia and all points in the United States.

The business of the plaintiff is that of transporting children to and from schools in Campbell County, Virginia. He has also been transporting special groups, usually, but not exclusively, school children and boy scouts, under charter contracts on educational tours, camping trips and church-convention trips. He holds no permit from the Interstate Commerce Commission, although some of these trips are across state lines. His application asked the Commission to determine whether or not these interstate operations were legally permissible without a permit, and if the Commission should hold that a permit was required, he asked that one be granted to him.

I.

In this proceeding, the plaintiff makes no contention that the fact findings of the Commission are not supported by substantial evidence. He contends, however, that by Title 49 USCA, Section 309 (b), being "fit, willing and able properly to perform the service of a contract carrier by motor vehicle," he is entitled to a permit, notwithstanding the fact that a number of common carriers serving the same area are providing, in addition to their common carrier service, chartered contract service. The theory of the plaintiff is that the National Transportation Policy, 54 Stat. 899; 49 USCA preceding Section 1 (See 1957 pocket part) requires the Commission so to administer the Act as to recognize and preserve "the inherent advantages" of all modes of transportation, subject to the provisions of the Act; that common carriers are engaged in one mode of transportation, and contract carriers

in another, and that considering the "inherent advantages" of both, it is not an answer to his application to say that contract services are being provided by the licensed common carriers, for, says the plaintiff, the public must not be "denied the service of a contract carrier, and forced to accept the substituted [charter] service of a common carrier."

The Commission and the five intervening common carriers who oppose the application contend that the common carriers operating in the area do in fact provide adequate charter service of the type which the applicant proffers; that the service the applicant proposes to offer the public is not essentially different from the charter service which the common carriers are already providing; and that there is no basis in law for any distinction between the charter services presently available and those the plaintiff seeks authority to provide. The defendants say that when the statute speaks of "recognizing and preserving the inherent advantages" of the respective modes of transportation, it refers to something other than the mere incidental question of whether the charter service is being provided by licensed common carrier or by one who engages in contract carriage exclusively.

The case of *Schaffer Transportation Co.* v. *United States*, 355 U. S. 83, relied upon by the plaintiff, does not support his argument. What the court there decided was that the existing rail service for shipments of granite did not excuse the Commission from comparing and considering the "inherent advantages" of shipments by motor service. We need not go so far as to adopt the defendants' view that the "modes of transportation" refer only to transportation by water, highway and rail, and to no other bases of comparison. "Modes of transportation" may possibly pertain to other differences. However, we do not agree that the National Transportation Policy adopted by Congress legislated, as the plaintiff contends, that, even though a particular type of charter service is made adequately available by common carriers, the Commission must nevertheless authorize duplicate service, whenever the same is tendered, by contract carriers who are not common carriers. In other words, we do not believe that Congress, in laying down its national policy,

meant that, notwithstanding the existence of adequate contract charter service by common carriers, the Commission is still compelled to allow duplicate facilities by one who offers contract service exclusively.

We hold that when an application is made for a permit to furnish contract service in an area already served in that fashion by common carriers, the Commission has the duty to determine whether the existing contract service is adequate and whether the additional proposed service will be inconsistent with the public interests and the national transportation policy.

II.

The further contention made by the plaintiff is based upon Title 49 USCA, Section 303 (b) (1). This section, it is true, exempts from regulation by the Interstate Commerce Commission (except as to certain safety measures) motor vehicles employed solely in transporting children and teachers to and from school. We agree that, if the plaintiff limited himself to the transportation of children and teachers to and from school within the State of Virginia, the Interstate Commerce Commission could not regulate him, but we do not agree that he comes within the exempting provision of Section 303 (b) (9) for the reason that he is not, in the language of that provision, a "person not engaged in transportation by motor vehicle as a regular occupation or business."

The purpose of Section 303 (b) (9) is to exempt casual or occasional transportation of passengers or property by motor vehicle in interstate commerce by a person not engaged in transportation by motor vehicle as a regular occupation or business. It is clear beyond question, however, that the plaintiff is regularly engaged in that occupation or business.

While administrative interpretation cannot change a clear provision of the law, it may, in a doubtful case, assist in its interpretation. We do not think that the point is doubtful, but even if it were, it would be set at rest by the consistent administrative rulings of the Commission during the past twenty years that a person engaged in transporting in *intra-*

state commerce by motor vehicle as a regular occupation is not exempt from regulation if he undertakes also even casual or occasional transportation of passengers in interstate commerce. *Interstate Commerce Commission Ruling No.* 49, Apr. 15, 1937, and *Interstate Commerce Commission Ruling No.* 80, May 23, 1939. While the instances in which this view was formally declared by the Commission are not numerous, no instance has been cited to us wherein the Commission has departed therefrom. Although the facts are not precisely like ours, *Webster Common Carrier Application*, 72 M.C.C. 768 (1957) is analogous and is in accord with these rulings.

The Commission found and concluded that the proposed service is not essentially different from the charter service afforded by the opposing motor common carriers; that the applicant has failed to show a real need for the proposed service which cannot be met by the existing carriers, and that he failed to establish that the proposed operation would be consistent with the public interest and the National Transportation Policy. The rejection of the plaintiff's application necessarily followed.

We are not at liberty to try the case *de novo*. It is conceded that the findings of fact are substantially supported by the evidence. Even if we should disagree with the Commission's judgment in resolving the conflicting competitive considerations, we are not authorized to substitute our own views. *United States* v. *Pierce Auto Freight Lines*, 327 U. S. 515, at 535. See also *Schaffer Transportation Co.* v. *United States*, 355 U. S. 83, wherein the Supreme Court recently applied the well established rule that such considerations are for the Commission and not for the courts.

Finding no error of law, the plaintiff's petition is denied. An order will be entered accordingly.

SIMON E. SOBELOFF
United States Circuit Judge.
ROBY C. THOMPSON
United States District Judge.
A. D. BARKSDALE
United States District Judge.

APPENDIX B

This report will not be printed in full in the permanent series of Motor Carrier Reports of the Commission.

DATE OF SERVICE
JUL 8 1957

INTERSTATE COMMERCE COMMISSION

No. MC-116215

NORRIS EDWARD BASS CONTRACT CARRIER APPLICATION

Decided June 26, 1957.

Operation by applicant as a contract carrier by motor vehicle of passengers and their baggage, in charter service, between points in Virginia, on the one hand, and, on the other, all points in the United States, over irregular routes, found not consistent with the public interest and the national transportation policy. Application denied.

Wilbur G. Burnette for applicant.
Linwood C. Major, Jr., and *William C. Battle* for protestants.

REPORT OF THE COMMISSION

DIVISION 1, COMMISSIONERS HUTCHINSON, WALRATH, AND McPHERSON

BY DIVISION 1:

Exceptions to the order recommended by the examiner were filed by applicant, and certain protestants replied.

By application filed September 20, 1956, Norris Edward Bass, doing business as N. E. Bass, of Gladys, Va., seeks a

permit authorizing operation, in interstate or foreign commerce, as a contract carrier by motor vehicle of passengers and their baggage, in charter service, over irregular routes, between points in Virginia, on the one hand, and, on the other, all points in the United States. Five motor common carriers[1] oppose the application.

The examiner recommended that the application be denied. On exceptions, applicant contends (1) that protestants, which hold certificates to operate as common carriers of passengers, cannot furnish the charter service desired by public witnesses supporting the application; (2) that a public need has been shown for the proposed service; and (3) that the examiner erred in finding that applicant's past operations between points in Virginia and points in other States and the District of Columbia have been, and are unauthorized, and should be discontinued. In reply, protestants contend that applicant's position is untenable, and without merit, and that the application should be denied.

The evidence adduced has been considered in light of the exceptions and reply thereto, and we find the examiner's statement of facts to be correct and adequate in all material respects. We adopt such statement as our own, and we will restate the pertinent facts only to the extent necessary for clarity of discussion.

Applicant has been engaged in the transportation of school children to and from schools in Campbell County, Va., for several years. He also transports special groups of persons under charter contracts on educational tours, camping trips, and church-convention trips. Six buses of 36-passenger capacity are operated by applicant, of which two have been used in charter service. Applicant has provided charter service for certain groups as follows: school children and their supervisors and sponsors from points in Campbell County to Washington, D. C.; Boy Scouts from points in Campbell

[1]Atlantic Greyhound Corporation, Eastern Greyhound Lines, Richmond Greyhound Lines, Inc., Carolina Coach Co., Inc., and Virginia Stage Lines, Inc.

and Pittsylvania Counties, Va., and from Newport News, Va., to Philmont Scout Reservation at or near Cimarron, New Mex., in 1954, 1955, and 1956; school children from Lynchburg, Va., to Ridgecrest, N. C., in 1954; a church group from Lynchburg to White Sulphur Springs, W. Va., in 1955; school children from a point in Campbell County to Raleigh, N. C.; and school children from points in Campbell County to Chapel Hill, N. C., in 1956. The described operations were performed with the understanding that they were partially exempt from regulation under the provisions of the Interstate Commerce Act. Application seeks a determination of this question, and if operating authority is required to perform such service, he is willing to confne his future operations in interstate or foreign commerce to the occasional transportation of Boy Scout, church and children's groups. Applicant also has received requests for charter service to Niagara Falls, and New York, N. Y., but has made no trips to these points.

The application is supported by a Boy Scout executive in charge of Boy Scout organizations in 14 counties in south and central Virginia, the superintendent of public schools in Campbell County, and a minister with supervisory jurisdiction over churches of his faith located in Amherst, Pittsylvania, and Roanoke Counties, Va. For the past four years the Boy Scout executive has arranged for use of applicant's service between Lynchburg and Cimarron. Under the arrangements made, applicant's bus is leased to the group for the entire journey so that unscheduled side trips may be taken by the group enroute and upon arrival at Cimarron. Other carriers have been utilized for these trips, but due to extra charges for side trips and the inflexibility of the operation once the contracts have been arranged, their service has not been as satisfactory as that of applicant. Other scouting trips are being contemplated by the scout council represented by the witness, which would require transportation to points in northern Michigan and to Valley Forge, Pa. All public carriers are being contacted by the scout council, including rail carriers, for the Valley Forge trip which may become a biannual national scouting event.

Applicant's service has been satisfactory, and the scout council is willing to enter into such special contracts as the Commission may require, if the proposed service is authorized.

The school superintendent arranges for daily transportation to and from the schools of Campbell County, but does not select the carriers to be utilized for interstate trips planned for groups of school children. Such matters are within the jurisdiction of individual school principals, none of whom appeared in support of the application. The minister has utilized applicant's service for approximately six years, has found it to be satisfactory, and desires to use it in the future in connection with occasional trips of church groups to the District of Columbia and points in Pennsylvania and West Virginia. His satisfaction stems from applicant's congeniality and willingness to accommodate incidental desires and needs of his passengers. This witness never has requested information concerning charter service to points outside of Virginia from any other carrier.

Protestants conduct extensive motor bus operations over regular routes, and provide service to every point of substantial size or importance in Virginia. Under section 208(c) of the act, they may transport to all points in the United States, charter parties which originate at points on their regular routes or which originate at points within the territory served by their regular routes. See *Regulations Special or Chartered Party Service*, 20 M.C.C. 25. They maintain a substantial amount of equipment at various strategic points in Virginia which is available for group transportation. The supporting witnesses have presented no evidence to indicate that the group transportation desired by them cannot be performed by these common carriers under the Commission's rules and regulations as set forth in the Chartered Party Service case, supra. The proposed service is not essentially different from that offered and afforded by the opposing motor common carriers. We are unable, therefore, to agree with applicant's contentions (1) that the proposed service is that of a contract carrier, and (2) that since only common-carrier service is now available, a grant of the application

would be consistent with the public interest and the national transportation policy.

With respect to the contention that the examiner erred in concluding that applicant's past in interstate commerce operations have been unauthorized and should be discontinued, applicant argues that inasmuch as his transportation of school children, for the most part, is within Virginia, he is a "person not engaged in transportation by motor vehicle as a regular occupation or business" within the meaning of section 203 (b) (9) of the act, and, that, therefore, the occasional transportation performed by him in interstate commerce is within the exemption provided by that section. This contention is without merit. It is clear that the applicant is engaged in transportation by motor vehicle as a regular occupation or business, and that the considered operations are within the certificate or permit requirements of part II of the act. In the circumstances, applicant is required to obtain from us appropriate operating authority before he may engage further in for-hire transportation in interstate or foreign commerce.

The burden of proof is upon applicant to show that there is a real need for the proposed service which cannot be met by existing carriers. No such showing has been made, and, in the circumstances, we have no alternative but to deny the application. Other contentions, made by applicant do not warrant specific discussion, but have been considered and found to be not meritorious.

We find that applicant has failed to establish that the proposed operation would be consistent with the public interest and the national transportation policy; and that the application should be denied.

An appropriate order will be entered.

COMMISSIONER WALRATH being necessarily absent did not participate in the disposition of this proceeding.

APPENDIX C

STATUTES INVOLVED

National Transportation Policy

It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

Section 202 (49 U.S.C. 302)

(a) The provisions of this part apply to the transportation of passengers or property by motor carriers engaged in interstate or foreign commerce and to the procurement of and the provision of facilities for such transportation, and the regulation of such transportation, and of the procurement thereof, and the provision of facilities therefor, is hereby vested in the Interstate Commerce Commission.

(b) Nothing in this part shall be construed to affect the powers of taxation of the several States or to authorize a motor carrier to do an intrastate business on the highways of any State, or to interfere with the exclusive exercise by each

State of the power of regulation of intrastate commerce by motor carriers on the highways thereof.

Definitions: Sec. 203 (49 U.S. C. 303)

(a) As used in this part—

(5) The term "certificate" means a certificate of public convenience and necessity issued under this part to common carriers by motor vehicle.

(6) The term "permit" means a permit issued under this part to contract carriers by motor vehicle.

(14) The term "common carrier by motor vehicle" means any person which holds itself out to the general public to engage in the transportation by motor vehicle in interstate or foreign commerce of passengers or property or any class or classes thereof for compensation, whether over regular or irregular routes, except transportation by motor vehicle by an express company to the extent that such transportation has heretofore been subject to part I, to which extent such transportation shall continue to be considered to be and shall be regulated as transportation subject to part I.

(15) The term "contract carrier by motor vehicle" means any person which, under individual contracts or agreements, engages in the transportation (other than transportation referred to in paragraph (14) and the exception therein) by motor vehicle of passengers or property in interstate or foreign commerce for compensation.

(21) (b) Nothing in this part, except the provisions of section 204 relative to qualifications and maximum hours of service of employees and safety of operation or standards of equipment shall be construed to include (1) motor vehicles employed solely in transporting school children and teachers to or from school; * * (9) the casual, occasional, or reciprocal

transportation of passengers or property by motor vehicle in interstate or foreign commerce for compensation by any person not engaged in transportation by motor vehicle as a regular occupation or business, unless, in the case of transportation of passengers, such transportation is sold or offered for sale, or provided or procured or furnished or arranged for, by a broker, or by any other person who sells or offers for sale transportation furnished by a person lawfully engaged in the transportation of passengers by motor vehicle under a certificate or permit issued under this part or under a pending application for such a certificate or permit.

Section 204 (49 U.S.C. 304)

It shall be the duty of the Commission—

(1) To regulate common carriers by motor vehicle as provided in this part, and to that end the Commission may establish reasonable requirements with respect to continuous and adequate service, transportation of baggage and express, uniform systems of accounts, records, and reports, preservation of records, qualifications and maximum hours of service of employees, and safety of operation and equipment.

(2) To regulate contract carriers by motor vehicle as provided in this part, and to that end the Commission may establish reasonable requirements with respect to uniform systems of accounts, records, and reports, preservation of records qualifications and maximum hours of service of employees, and safety of operation and equipment.

Section 206 (49 U.S.C. 306)

(a) (1) Except as otherwise provided in this section and in section 210a, no common carrier by motor vehicle subject to the provisions of this part shall engage in any interstate or foreign operation on any public highway, or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operations:

Section 207 (49 U.S.C. 307)

(a) Subject to section 210, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if it is found that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this part and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity;

Section 208 (49 U.S.C. 308)

(c) Any common carrier by motor vehicle transporting passengers under a certificate issued under this part may transport in interstate or foreign commerce to any place special or chartered parties under such rules and regulations as the Commission shall have prescribed.

Section 209 (U.S.C. 309)

(b) Applications for such permits shall be made to the Commission in writing, be verified under oath, and shall be in such form and contain such information and be accompanied by proof of service upon such interested parties as the Commission may, by regulations, require. Subject to section 210, a permit shall be issued to any qualified applicant therefor authorizing in whole or in part the operations covered by the application, if it appears from the applications or from any hearing held thereon, that the applicant is fit, willing, and able properly to perform the service of a contract carrier by motor vehicle, and to conform to the provisions of this part and the lawful requirements, rules, and regulations of the Commission thereunder, and that the proposed operation, to the extent authorized by the permit will be consistent with the public interest and the national transportation policy declared in this Act.

In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 528

NORRIS EDWARD BASS, APPELLANT

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA

MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1 (c) of the Revised Rules of this Court, appellees United States of America and Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from the judgment of a three-judge district court dismissing an action brought by appellant to set aside an Interstate Commerce Commission order which denied his application for a permit to engage in interstate commerce as a contract carrier of passengers by motor vehicle. In the district court, appellant conceded that the Commission's find-

ings of fact are supported by substantial evidence (J. St. 18, 21).

Appellant has been engaged for several years in the business of transporting children to and from schools in Campbell County, Virginia (J. St. 23). He has also provided occasional charter bus service to out-of-state points for Boy Scout, church and children's groups (*id.*, 23–24). He applied to the Commission for a permit authorizing him to operate as a contract carrier of passengers in charter service between points in Virginia and all points in the United States, and also urged that he did not require Commission authorization in order to continue his prior interstate operations (*id.* 22–23). The Commission rejected the latter contention, and denied the contract-carrier application (*id.* 25–26). It ruled that appellant's proposed service "is not essentially different from that offered and afforded by the opposing motor common carriers" (*id.* 25), and that since appellant had not established that his proposed service met any need which existing carriers could not satisfy, he had failed to make the showing required by Section 209 (b) of the Act, *i. e.*, that the proposed operations "will be consistent with the public interest and the national transportation policy declared in this Act" (*id.* 26, 30).

The district court, in a *per curiam* opinion, unanimously upheld the validity of the Commission's order. It held that appellant's interstate operations were not within exemption (9) of Section 203 (b) of the Act (J. St. 20–21). It further held that the Commission's factual findings warranted and required re-

jection of the contract-carrier permit sought by appellant (*id.* 21). It observed: "Even if we should disagree with the Commission's judgment in resolving the conflicting competitive considerations, we are not authorized to substitute our own views" (*ibid.*).

ARGUMENT

1. Appellant contends that it was improper to reject his application upon the ground that existing common carriers offer essentially the same service as that which he proposes. He contends that since the statute makes provision for both common-carrier and contract-carrier passenger motor service, it recognizes that the two types of service are different, and that the public is entitled to have both types available. However, appellant is relying on a distinction without a difference insofar as chartered bus service is concerned. Section 208 (c) of the Act, 49 U. S. C. 308 (c), provides that any common carrier transporting passengers under a certificate issued by the Commission may transport in interstate commerce to any place "special or chartered parties" under such rules and regulations as the Commission shall have prescribed.[1] In the present case, the Commission merely determined that since several carriers could and did provide adequate chartered bus service, allowing appellant to duplicate this service would not be consistent with the public interest.

[1] The Commission's regulations define the quoted words as meaning "a group of persons who, pursuant to a common purpose and under a single contract, * * * have acquired the exclusive use of a passenger-carrying motor vehicle to travel together as a group to a specified destination or for a particular itinerary * * *." *Regulations, Special or Chartered Party Service*, 29 M. C. C. 25, 47–48.

Congress might have excluded all charter service from the authority which is conferred by grant of a certificate to render passenger service as a common carrier by motor. It chose, instead, to include within this grant authority to furnish chartered bus service. This is a legislative determination that common carriers are entitled to render this type of service, and to receive the revenue accruing therefrom, and the Commission and the courts must respect the Congressional decision to put chartered bus operations within the common carrier field.

The decision below is not in any respect in conflict with *Schaffer Transportation Co.* v. *United States*, 355 U. S. 83. That case held that the Commission did not give proper effect to the National Transportation Policy declared by Congress when it rejected an application for authority to provide common carrier motor service for shippers presently having only rail service available, without passing upon the question of the possible advantages inherent in the different mode of transportation for which a certificate was sought. Since the present appellant did not propose to furnish a mode of transportation different from that already available, the Commission had no occasion to appraise or weigh the advantages inherent in one mode of transportation as compared with another. In short, the instant case does not involve or present the issue decided in *Schaffer*. And the same mode of transportation is not converted into a differing mode, within the meaning of the statute's National Transportation Policy declaration, because existing carriers derive their authority to furnish this transportation from

common-carrier certificates issued under Section 206 of the Act whereas appellant sought authority to furnish the same mode of transportation by virtue of grant of a contract-carrier permit issued under Section 209 of the Act.

2. We submit that the Commission and the court below were clearly correct in rejecting appellant's contention that his interstate operations fall within exemption (9) of Section 203 (b), which excludes from Part II of the Act (except certain provisions of Section 204) "the casual, occasional, or reciprocal transportation of passengers or property by motor vehicle in interstate or foreign commerce for compensation by any person not engaged in transportation by motor vehicle as a regular occupation or business." Exemption (1) of Section 203 (b), covering "motor vehicles employed solely in transporting school chi. ren and teachers to or from school", is not applicable here because appellant's motor vehicles are not so employed in its interstate operations.

The court below said that it is "clear beyond question" that appellant, who has been engaged for several years in transporting school children to and from schools in a certain Virginia county, is engaged in transportation by motor vehicle as a regular occupation or business (J. St. 20). The fact that this transportation is intrastate does not mean that appellant is not engaging in motor transportation as a regular business. The court below considered this conclusion free from doubt, but said that, even if it were doubtful, "it would be set at rest by the consistent administrative rulings of the Commission during the past twenty years

that a person engaged in transporting in *intrastate* commerce by motor vehicle as a regular occupation is not exempt from regulation if he undertakes also even casual or occasional transportation of passengers in interstate commerce" (J. St. 20–21).[2] Thus, as the court observed, appellant is outside the claimed exemption both on the basis of the clear meaning of its language and on the basis of consistent administrative construction.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this appeal presents no substantial question and that the judgment of the district court should be affirmed.

J. LEE RANKIN,
Solicitor General.

VICTOR R. HANSEN,
Assistant Attorney General.

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Interstate Commerce Commission.

DECEMBER 1958.

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[2] As to the rulings to which the court below referred, see Interstate Commerce Commission Ruling No. 49, April 15, 1937; Interstate Commerce Commission Ruling No. 80, May 23, 1939; *Webster Common Carrier Application*, 72 M. C. C. 708 (1957). Appellant has not cited any contrary Commission ruling, either in the district court (J. St. 21) or in this Court.

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No. 528

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

NORRIS EDWARD BASS, d/b/a N. E. BASS, GLADYS, VIRGINIA
Appellant

v.

UNITED STATES OF AMERICA
INTERSTATE COMMERCE COMMISSION
ATLANTIC GREYHOUND CORPORATION
CAROLINA COACH COMPANY, INC.
EASTERN GREYHOUND LINES
RICHMOND GREYHOUND LINES, INC.
VIRGINIA STAGE LINES, INC.
Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA LYNCHBURG DIVISION

MOTION TO AFFIRM

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IN THE

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OCTOBER TERM, 1958

No. 528

NORRIS EDWARD BASS, d/b/a N. E. BASS, GLADYS, VIRGINIA
Appellant
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UNITED STATES OF AMERICA
INTERSTATE COMMERCE COMMISSION
ATLANTIC GREYHOUND CORPORATION
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Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA LYNCHBURG DIVISION

MOTION TO AFFIRM

Appellees, Atlantic Greyhound Corporation, Carolina Coach Company, Inc., Eastern Greyhound Lines, Richmond Greyhound Lines, Inc., and Virginia Stage Lines, Inc., move the Court to affirm the judgment sought to be reviewed on appeal upon the ground that the questions presented are so unsubstantial as not to need further argument. (Rule 16, 1(c))

STATEMENT

This is a direct appeal from a final judgment entered on July 11, 1958, by a three-judge district court convened under 28 U.S.C. 2284 and 2325, dismissing appellant's request to

set aside an order of the Interstate Commerce Commission. The decision of the Commission is set forth in Appendix B to the jurisdictional statement of the appellant.

On June 26, 1957, the Interstate Commerce Commission issued a report and order denying appellant's application, under section 209(b) of the Interstate Commerce Act (49 U.S.C. 309(b)), for authority to operate as a contract carrier by motor vehicle of passengers, in charter service, between points in Virginia and all points in the United States. Denial of the application was predicated primarily upon the grounds that: (1) applicant failed to prove that any need for the proposed service cannot be provided by existing common carriers; (2) applicant's proposed charter bus service is not essentially different from that offered and afforded by the opposing motor common carriers; and (3) applicant had failed to establish that its proposed service would be consistent with the public interest and the national transportation policy.

In that same report and order, the Commission also found that applicant, who is presently engaged in the business of transporting children to and from schools in Campbell County, Virginia, does not qualify for the exemption provided for in section 203(b)(9) of the Act (49 U.S.C. 303(b)(9)) relating to the casual or occasional transportation of property or passengers in interstate commerce by a person not engaged in transportation as an occupation or business.

The Court below unanimously sustained the findings and order of the Interstate Commerce Commission.

ARGUMENT

I.

No Substantial Question Presented

Although appellant contends that there are 15 questions presented by its appeal, basically there are but two issues to be determined by the Court as the several questions posed

by appellant quite obviously duplicate or overlap each other.

The first issue raised by appellant is whether the Commission may properly consider the adequacy of service offered by existing common carriers in determining if a service proposed by an applicant for a contract-carrier permit is consistent with the public interset and the national transportation policy.

Section 203(a)(15) of the Interstate Commerce Act (49 U.S.C. 303(a)(15)), prior to the 1957 amendment, defined a contract carrier, *inter alia*, as any person who, under individual contracts, engages in transportation for hire in interstate or foreign commerce other than as a common carrier. By Section 209(b) of the same Act (49 U.S.C. 309(b)), Congress authorized the Commission, upon application, to issue a permit if the operations proposed "will be consistent with the public interest and the national transpor ion policy . . . ."

Applicant does not contend that the adequacy of existing service is not a proper factor to be considered in determining the consistency with the public interest of the proposed service, nor does he except to the findings of the Commission: (1) that the proposed charter service from points in Virginia to all points in the United States is essentially identical to that presently offered by existing common carriers; and (2) that, as a matter of fact, the present service is adequate. It is appellant's contention, however, that, as a matter of law, the Commission cannot consider the adequacy of the service offered by common carriers in disposing of an application for a contract carrier permit. In support of this proposition, appellant relies upon some alleged, but unidentified, inherent differences between common and contract carriage, and upon this Court's decision in *Schaffer Transportation Company* v. *United States*, 355 U.S. 83 (1957). Neither supports appellant's not-too-novel theory.

Contrary to there being any inherent difference in common and contract carriage as such, one of the most frequently voiced criticisms of the Motor Carrier Act (Part II of the

Interstate Commerce Act) as originally enacted, was the failure of Congress to draw a clear line of demarcation between the two.[1] See testimony of Commission Chairman Owen Clarke before the Senate Subcommittee on Surface Transportation, U.S. Code Cong. & Adm. News 1599, 85th Congress, 1st Session, 1957. Furthermore, the rationale of the *Schaffer* case, instead of supporting appellant, actually points the other way. The precise holding of that case is that the Commission must not summarily deny an application for motor-carrier authority just because a different mode of transportation, *i.e.*, rail, can handle the traffic. This Court was careful to point out that the Commission must compare the particular service proposed, and its advantages, with the service presently available from *any* mode of transportation. In this respect, the Court stated:

> "Of course adequacy of rail service is a relevant consideration but . . . 'relative or comparative adequacy' of the existing service is the significant consideration . . . ."

Obviously, this Court was not sanctioning unwarranted duplication of service such as appellant proposes.

Thus, under the reasoning of the *Schaffer* case, and assuming arguendo that contract and common carriers offer different modes of transportation, the Commission certainly would have committed error in granting appellant a permit for contract carriage without considering the adequacy of existing common-carrier service.

In the instant case, the Commission considered the present and proposed service, and found that the service proposed by appellant is identical with that presently available from and offered by protesting common carriers. In such a situation,

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[1] This is particularly true in charter bus service, as the nature of such service renders it the equivalent of contract carrier service. See *Rule 2 of Regulations, Special or Chartered Party Service*, 29 M.C.C. 25, 47 (1941).

the Commission has consistently denied applications for contract-carrier permits and has concluded that:

> " . . . we would be remiss in our duty under the national transportation policy of fostering 'sound economic conditions in transportation . . .' if we authorized operation by a contract carrier on such tenuous bases as here involved, where it definitely would result in diversion of traffic from existing common carriers through no fault of their own or any inadequacy in their service." *Guex Extension — Chicago Commercial Zone*, 67 M.C.C. 224, 225 (1956).

To the same effect see *Wilson* v. *United States*, 114 F. Supp. 814 (1953); *Huss, Inc., Extension — Lumber*, 64 M.C.C. 439 (1955); *Sauers Extension—East Cambridge, Mass.*, 61 M.C.C. 65 (1952); *Walter C. Benson Co., Inc., Extension—N.Y., N.J., and Pa.*, 61 M.C.C. 128 (1952); *Shoemaker Contract Carrier Application*, 53 M.C.C. 246 (1952); *Kilmer Transp. Co. Extension—Uniontown*, 53 M.C.C. 561 (1951); *Karzen Contract Carrier Application*, 31 M.C.C. 613 (1942); *Tom Still Transfer Co.*, 27 M.C.C. 42, 44 (1940); and *Cox Contract Carrier Application*, 14 M.C.C. 777 (1939).

From the beginning of motor carrier regulation, the Commission has considered that the reason for the regulation of contract carriers was for the protection and maintenance of adequate and efficient common-carrier service, *Contracts of Contract Carriers*, 1 M.C.C. 628, 629 (1937); *Keystone Transportation Co. Contract Carrier Application*, 19 M.C.C. 475 (1939), and, consistent with this view of the purpose of the regulation, has issued contract-carrier permits only where the proposed operations offered service of a specialized nature tailored to fit the needs of individuals, which service was not presently available. *Illing Contract Carrier Application*, 52 M.C.C. 79 (1950); *Walter C. Benson Co., Inc., Extension — N.Y., N. J., and Pa., supra; Parry Extension of Operations — Property*, 44 M.C.C. 351 (1945). Contrary to the assertions of appellant, this practice has been followed regardless of

whether the proposed service involved the carriage of property or passengers. See *e.g., Illing Contract Carrier Application, supra.*

This long-established interpretation by the Commission of its duty and authority was recognized and not disturbed by this Court in *United States* v. *Contract Steel Carriers*, 350 U. S. 409 (1956), and, as hereinafter indicated, has been confirmed by Congress in the 1957 amendment to the Interstate Commerce Act.

In August, 1957, Congress, by Public Law 85-164, 71 Stat. 412, amended section 203(a)(15) of the Interstate Commerce Act (49 U.S.C. 303(a)(15)) to define a contract carrier as:

> " . . . any person which engages in transportation by motor vehicle of passengers or property in interstate or foreign commerce . . . under continuing contracts with one person or a limited number of persons either (a) for the furnishing of transportation services through the assignment of motor vehicles for a continuing period of time to the exclusive use of each person served or (b) for the furnishing of transportation services designed to meet the distinct needs of each individual customer."

At the same time, Congress amended section 209(b) of the Act (49 U.S.C. 309(b)) to insert a provision that the Commission, in considering an application for a contract-carrier permit, shall consider "the effect which granting the permit would have upon the services of protesting carriers . . . ."

The language and legislative history of this amendment establish beyond any doubt that Congress intends the Commission to consider the adequacy of the service offered by common carriers in determining whether a service proposed by an applicant for a contract carrier permit is consistent with the public interest. In fact, the bill, as first offered, would have defined a contract carrier, in part, as one who proposes service "not provided by common carriers." Senate Report No. 703, July 24, 1957. This provision was not in-

cluded in the amendment, as enacted, because of the belief of Congress that it was not necessary in view of the requirement of a specialized service. *Id.*

As a result of this legislative action, even if this Court should conclude that the Commission has misconstrued its authority under the Act, as originally enacted, and should reverse, the Commission, upon remand, would be bound to follow the edict of the new law and consider the services offered by protesting common carriers in disposing of appellant's application. This issue, therefore, has been rendered moot, not only as to appellant, but to the motor-carrier industry generally.

The second issue raised by appellant is whether the proposed charter service qualifies for the exemption from economic regulation contained in Section 203(b)(9) (49 U.S.C. 303(b)(9)) relating to casual or occasional transportation by a person not engaged in transportation as a regular course of business or occupation.

Appellant is presently engaged in the business of transporting school children to and from schools in Campbell County, Virginia, and this is his sole means of livelihood. He proposes to transport various groups in charter service from all points in Virginia to all points in the United States, and return, and will hold himself out to provide this service as regularly and as frequently as required by the demands of interested groups.

Section 203(b)(9) (49 U.S.C. 303 (b)(9)) provides that the permit requirements of the Act shall not apply to:

> "the casual, occasional or reciprocal transportation of passengers or property by motor vehicle in interstate or foreign commerce for compensation by any person not engaged in transportation by motor vehicle as a regular occupation or business . . . ."

To qualify for this exemption, the proposed service must not only be casual or occasional, but also must not be provided

by a person engaged in transportation as a regular course of business or occupation.

The words "casual" and "occasional" are not defined by the Act and, therefore, under general rules of statutory construction, each must be given the meaning it would have in ordinary usage. *Crane* v. *Commissioner of Internal Revenue*, 331 U.S. 1 (1946); *Addison* v. *Holly Hill Fruit Products*, 322 U.S. 607 (1943); *Martin* v. *United States*, 100 F 2d 490, 494, (1939). In ordinary usage, "casual" and "occasional" have been construed consistently to infer an element of chance, haphazardness, or lack of design. *Texas & N.O.R. Co.* v. *Owens*, 54 S.W. 2d 848, 853 (Tex. 1932); *Root* v. *Topeka Ry.*, 96 Kan. 694, 153 Pac. 550 (1915); Black's Law Dictionary, p. 274 (4th ed. 1951); Webster's New Collegiate Dictionary (2d ed. 1951), none of which is characteristic of the service planned by appellant. On the contrary, appellant proposes to provide interstate charter bus service as frequently and as regularly as the need and demand of the public may require.

While not expressed, apparently the only basis appellant has for his contention that the proposed service is "casual" or "occasional" is that it will not be operated on any fixed schedule or predetermined frequency, but will be on call or demand. If this basis is sufficient to render the charter service casual or occasional, then the Commission has been in error from the beginning of motor carrier regulation in taking jurisdiction over applications for certificates authorizing special or charter bus operations, as *all* such service is provided only upon call or demand. It is obvious that Congress did not intend this result since they provide, in Section 207 of the Act (49 U.S.C. 307), for the issuance by the Commission of certificates for special or charter bus operations.

Even assuming, however, that the proposed interstate operations of appellant are casual or occasional, nevertheless the exemption of 203(b)(9) is inapplicable because appellant is a

person engaged in transportation as a regular course of business or occupation.

In regard to this provision of the exemption, appellant contends that the phrase "transportation as a regular course of business or occupation" refers only to interstate transportation, and that, as a result, his intrastate operations do not disqualify him for the exemption. There is, however, no basis whatsoever for this contention, and, indeed, none is advanced by appellant. "Transportation," unlike many other words, is not defined in the Interstate Commerce Act. Section 203(a)(19) (49 U.S.C. 303(a)(19)), which refers to transportation, is not definitive and purports only to include activities not normally considered a part of transportation. The legislative history of this section of the Act, however, indicates that this exemption was intended to apply only to the operations of farmers and others who occasionally haul for hire, but who do not enter in any important way into the competitive picture of the motor carrier industry. 79 Cong. Rec. 5651. Furthermore, the Commission, without a single exception during the course of 20 years, has held that the term "transportation as a regular course of business or occupation" includes intrastate as well as interstate operations. I.C.C. Administrative Ruling No. 49, April 15, 1937; *Motor Carrier Regulations-Exemptions*, 10 M.C.C. 533 (1938); *Aaron W. Johnson, Common Carrier Application*, 54 M.C.C. 822, (1952); *Webster Common Carrier Application*, 72 M.C.C. 708 (1957). This consistent administrative interpretation is entitled to great weight before this Court and should not be overturned except for cogent reasons. *U. S.* v. *Chicago, N.S.&M.R. Co.*, 288 U.S. 1 (1932).

The issue of exemption, timidly raised by appellant, is not only unsubstantial, but, in view of the reasonable interpretation of the Commission over a long period of time, is actually frivolous.

CONCLUSION

For the foregoing reasons, we submit that the decision below is correct and that this appeal presents no substantial question. Accordingly, the judgement of the District Court should be affirmed.

Respectfully submitted,

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AND
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Dated December 19, 1958

CERTIFICATE OF SERVICE

I hereby certify that I have this 19th day of December, 1958, served a copy of the foregoing Motion to Affirm upon the counsel of record as listed below by first class U. S. Mail, with postage prepaid and addressed as follows:

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FILE COPY

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No. 528

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

NORRIS EDWARD BASS
D/B/A N. E. BASS, APPELLANT

v.

UNITED STATES OF AMERICA
INTERSTATE COMMERCE COMMISSION
ATLANTIC GREYHOUND CORPORATION
CAROLINA COACH COMPANY, INC.
EASTERN GREYHOUND LINES
RICHMOND GREYHOUND LINES, INC.
VIRGINIA STAGE LINES, INC.,

APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA

ANSWER OF APPELLANT TO THE MOTION TO AFFIRM FILED BY APPELLEES

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STATEMENT

Appellant filed with the Interstate Commerce Commission an application under 49 U. S. C. 309 (a) seeking a permit authorizing him to engage in transportation as a contract carrier of passengers. The motor carriers, appellees

here, appeared at the hearing in opposition to the application of appellant. The Commission denied the application (J. St. 22-26) and suit was instituted in United States District Court for the Western District of Virginia to set aside and annul the order of the Commission. The case was heard by a three-judge District Court and the petition denied (J. St. 17-21).

Congress, in its wisdom, provided the public with two classes of motor carrier passenger service and it is important to a proper determination of the issues here presented to understand the two classes of carriers and what each can and cannot do. One class is the service rendered by a common carrier under a certificate *(49 U. S. C. 303 (5) (14)* and *49 U. S. C. 307 (a))*, and that class of carriers is a common carrier holding itself out to the general public to transport passengers and property for compensation, *49 U. S. C. 303 (14)*, and that class must serve all who seek its services and, under the Act, it must serve them without unjust discrimination and adhere to published rates, so said the Commission in *1 M. C. C. 628 (630)*.

The other class of carrier is a contract carrier and that class is any person which, under individual contracts or agreements, engages in transportation of passengers for compensation, *49 U. S. C. 303 (15)*, and that class is free to pick and choose among shippers and under the Act may discriminate in its services to them and its charges may be called in question only if they are found to fall below a reasonable minimum level, so said the Commission in *Contracts of Contract Carriers, 1 M. C. C. 628 (630)*.

Both the motion of the United States and the motion of the motor carriers deal with the same proposition, which is expressed by the United States to be: "It (the Commission) ruled that appellant's proposed service is not essentially different from that offered and afforded by the opposing motor common carriers and that since appellant had not established that his proposed service met any need which

existing carriers could not satisfy, he had failed to make the showing required by Section 209 (b) of the Act, i. e., that the proposed operations will be consistent with the public interest and the National Transportation Policy declared in the Act. Also that appellant's operations were not within exemption (9) of Section 203 (b) of the Act." (49 U. S. C. 303 (b)).

The opposing motor carriers and the United States approach the proposition from somewhat different positions and for that reason we will direct our reply to the general proposition stated in the appeal.

The motor carriers, appellees, at sheets 6 and 7 of their motion to affirm, refer to certain amendments to the Motor Carrier Act effective in August 1957. The amendments have no bearing on the issues in this proceeding as the application was filed in September of 1956 or eleven months before the amendments and the application is to be determined by the laws in effect when the application was filed.

THE DIFFERENCE

Congress provided that a common carrier must transport passengers for the general public for compensation, *49 U. S. C. 303 (14)*. The Commission in *1 M. C. C. 628 (630)* said of the common carrier that:

> "The common carrier holding itself out to that traffic of a certain description must serve all who seek its service, and under the Act, it must serve them without unjust discrimination and adhere to published rates."

Congress then provided that a contract carrier is any person which, under individual contracts or agreements, engages in the transportation of passengers for compensation, *49 U. S. C. 303 (15)*. The Commission in *1 M. C. C. 628 (630)* said of the contract carrier that:

> "The contract carrier is free to pick and choose among shippers, and under the Act it may discriminate in its services to them and its charges may be called in question only if they are found to fall below a reasonable minimum level."

It is obvious from the above showing that the order of the Commission and the decision of the District Court are per se contrary to law and that substantial questions are presented for determination by this Court.

ARGUMENT

The report of the Commission shows that the application is supported by a Boy Scout executive, a superintendent of public schools for Campbell County, Virginia, and a minister (a Negro preacher); that for the past four years, the Boy Scout executive has arranged for use of applicant's service between Lynchburg and Cimarron; that under the arrangements made, applicant's bus is leased to the group for the entire journey so that unscheduled side trips may be taken by the group enroute and upon arrival at Cimarron; and that other carriers have been utilized for these trips but due to extra charges for side trips and the inflexibility of the operation once the contracts have been arranged, their service has not been as satisfactory as that of applicant (J. St. 24).

Not withstanding the uncontradicted testimony of the witnesses for applicant to the effect that the service of the common carriers is not as satisfactory as the service of applicant due to the extra charges for side trips and the inflexibility of the operation of the common carriers once the contracts have been arranged, the report of the Commission shows:

> "That the supporting witnesses have presented no evidence to indicate that the group transportation desired by them cannot be performed by these

> common carriers under the Commission's rules and regulations as set forth in the Chartered Party Service Case; that the proposed service is not essentially different from that offered and afforded by the opposing motor common carriers; and that we are unable, therefore, to agree with applicant's contention (1) that the proposed service is that of a contract carrier, and (2) that since only common carrier service is now available, a grant of the application would be consistent with the public interest and the National Transportation Policy."
>
> (J. St. 25, 26)

A reading of Section 209 (b) of the Act, *49 U. S. C. 309 (b)* to find out what appellant must prove, along with the conclusions expressed by the Commission as pointed out above, will remove all doubt that the order of the Commission is unlawful and must not be permitted to stand.

In view of the conclusion the Commission reached, which was sustained by the District Court, it becomes necessary to answer the motion to affirm by distinguishing between a common carrier and a contract carrier and to show what the Act requires an applicant for a permit to prove in order to operate as a contract carrier and the meaning of "consistent with the public interest" as used in the Act and by the Commission. From these disclosures, it will become abundantly clear that the Commission denied the application of appellant contrary to law and that the District Court erred in sustaining the Commission.

THERE IS A DIFFERENCE BETWEEN COMMON AND CONTRACT CARRIERS.

The Act itself defines a common carrier as being any person which holds itself out to the general public to engage in transportation of passengers or property for compensation, *49 U. S. C. 303 (14), J. St. 28)*, and the same act defines a

contract carrier to be any person which, under individual contracts or agreements, engages in the transportation of passengers or property for compensation, *49 U. S. C. 303 (15), J. St. 28.*

The statute is clear that there is a difference between the services of a common carrier and the services of a contract carrier which difference the Commission, contrary to law, failed and refused to recognize in this proceeding. The Commission itself makes a difference between these carriers and has held that the common carrier performs a service resulting from an undertaking to serve the public indiscriminately, up to the capacity of its equipment and within the limits of its undertaking, *Scott Bros., Inc. 2 M. C. C. 155 (161).* But the Commission says that a contract carrier, on the other hand, is in reality only a form of private carriage, *see 1 M. C. C. 628.* The difference, therefore, is in the service—one, a common carrier, is a public carrier, and the other, a contract carrier, is a form of private carriage.

The Commission distinguishes between the two classes of carriers in *1 M. C. C. 628 (630), Contracts of Contract Carriers* as follows:

> "A contract carrier has certain inherent advantages in competition over a common carrier. There is a great difference in the conditions under which traffic can be hauled for shippers by motor carriers, even when the traffic is of the same kind. Naturally the traffic of the larger shippers, who can offer volume and steady movement, is particularly desirable. The common carrier holding itself out to that traffic of a certain description must serve all who seek its services, and under the Act, it must serve them without unjust discrimination and adhere to published rates. The contract carrier, on the other hand, is free to pick and choose among shippers, and under the Act it may discriminate in

> its services to them and its charges may be called in question only if they are found to fall below a reasonable minimum level. *By reason of these circumstances, contract carriers are enabled to give a higher type of special and personal service to their shippers than is possible for common carriers;* and it is the need and demand for this service which constitute the chief of their justification for the contract carriers in the present motor transportation system. (Emphasis mine)

The above decision of the Commission clearly shows the difference in operation, service, etc., between a common carrier and a contract carrier. Therefore, we come to the inescapable conclusion that the Commission erred as a matter of law and acted contrary to the Motor Carrier Act when it denied the application of appellant on the grounds that the proposed service is not essentially different from that offered and afforded by the opposing motor common carriers and that applicant should show that there is a real need for the proposed service which cannot be met by existing carriers when, as here, the record shows that the service of the opposing common carriers is not what the witnesses need. Furthermore, these opposing common carriers cannot, under the law and the decision of the Commission in *Contracts of Contract Carriers, 1 M. C. C. 628,* perform contract carrier service. In fact, these opposing common carriers can only render special or chartered party service under their certificate as a common carrier, *49 U. S. C. 308, J. St. 30).* If Congress had intended that common carriers of passengers should render contract carrier passenger service, Congress would have used the words "contract carrier passenger service" instead of "special or chartered parties" as it did use in *49 U. S. C. 308 (c).* Moreover, if Congress did not intend for the public to have contract carrier passenger service in addition to special or chartered party passenger service, Congress

would *not* have provided in *Section 203 (15)* and *Section 209 of the Motor Carrier Act, 1935, 49 M. C. C. 303 (15)* and *49 U. S. C. 309(b)* for contract carrier passenger service. Therefore, since Congress provided for contract carrier passenger service to be rendered under a permit by a contract carrier and provided for special or chartered parties passenger service to be rendered under a certificate by a common carrier, it is contrary to law to deny contract carrier passenger service by a contract carrier notwithstanding the adequacy or inadequacy of common carrier service because the Commission itself has held that the service of a contract carrier and that of a common carrier are different and are not similar nor are the same. In fact, the Commission said contract carrier service is special or personal service and common carrier service is service to all the public without unjust discrimination. The above discussion shows conclusively that the denial of contract carrier service is improper as a matter of law.

The charter bus service of common carriers as permitted in *49 U. S. C. 308* is not contract carrier service because it is only equivalent to contract carrier service as the motor carriers appellees point out at sheet 4 of their motion as follows:

> "This is particularly true in charter bus service, as the nature of such service renders it the equivalent of contract carrier service. See Rule 2 of *Regulations, 29 M. C. C. 25, 47.*"

The equivalent is not contract carrier service and that fact shows the decision of the Commission and the Court to be wrong as a matter of law.

The Commission further distinguishes contract carrier service from common carrier special or chartered passenger service by defining special or chartered parties as meaning a group of persons who, pursuant to a common purpose and

under a single contract, have acquired (get this if you please) the exclusive use (not service) of a passenger-carrying motor vehicle (not service but a vehicle only) to travel together as a group to a specified destination or for a particular itinerary, *29 M. C. C. 25, 47-48.* A contract carrier, on the other hand, operates only under individual contracts or agreements rendering special or personal service (not vehicles). There is a difference as shown above in service and operation, as a matter of law, between the operation of a common carrier and a contract carrier and the Commission and the District Court cannot lawfully merge passenger service rendered by contract carriers with passenger service rendered by common carriers when Congress completely divorced these two classes of service and carriers and provided that the public shall have available both classes of carrier service.

Before leaving the definition the Commission fixed for special or chartered parties for common carriers of passengers, it is well to recall to memory the evidence of the applicant which was to the effect that other carriers have been utilized for these trips, but due to extra charges for side trips and the inflexibility of the operation once the contracts have been arranged, their service is not as satisfactory as that of applicant. Consequently, the equivalent to contract carrier service is not contract carrier service because it is not special or personal service.

The record shows conclusively that the service of the opposing motor common carriers is not that of a contract carrier and not the kind of service proposed by appellant. There is a reason why the opposing motor common carriers cannot render contract carrier service. First, Congress did not permit common carriers of passengers to render contract carrier service and if those carriers are rendering contract carrier service as defined in *Section 203 (15) of the Motor Carrier Act, 49 U. S. C. 303 (15)*, then they are conducting unlawful operation as Congress specifically provided

that common carriers can conduct operations for the general public, *49 U. S. C. 303 (14)*. Secondly, Congress provided that common carriers of passengers defined in *Section 203 (14), 49 U. S. C. 303 (14)*, may transport to any place special or chartered parties under such rules as the Commission shall have prescribed. Please note that Congress did not give common carriers of passengers the authority to conduct operation as a contract carrier. The service of a common carrier in special or chartered parties must be rendered to all without unjust discrimination and at the published rates. The services of a contract carrier can be discriminatory and those carriers can pick and choose whom they will serve, *1 M. C. C. 628 (630)*. Thirdly, the Interstate Commerce Commission specifically provided that a group of persons, with a common purpose, can acquire the exclusive use of a passenger-carrying motor vehicle to travel together as a group to a specified destination or for a particular itinerary, *29 M. C. C. 25, 47-48*. Under the definition of special or chartered parties of the Commission, a group of people may acquire from a common carrier the exclusive use of a *passenger-carrying motor vehicle* but not transportation service from a common carrier. There is a difference between acquiring the use of a vehicle and receiving service. Obviously, a common carrier cannot render contract carrier passenger service under the Act or under the rule prescribed by the Commission. Consequently, the denial of the application of appellant was contrary to law as the special or chartered party service of common carriers is not contract carrier service within the meaning of the Act.

THE PROOF REQUIRED IS FOUND IN THE ACT.

Section 209 (b) of the Motor Carrier Act, 49 U. S. C. 309 (b), provides that a permit shall be issued to any qualified applicant for a permit authorizing in whole or in part the operation covered by the application if it appears from the application or from a hearing held thereon, that

the applicant is fit, willing and able properly to perform the service of a contract carrier by motor vehicle * * *, and that the proposed operation, to the extent authorized by the permit, will be consistent with the public interest and the National Transportation Policy declared in this Act.

In response to the application for a permit under the Act, the Commission denied the application of appellant on the erroneous theory and contrary to the specific mandate of Congress, on the grounds by holding:

> "That the burden of proof is upon applicant to show that there is a real need for the proposed service which cannot be met by existing carriers. No such showing has been made, and, in the circumstances, we have no alternative but to deny the application." (J. St. 26)

Section 209 (b) of the Motor Carrier Act, 49 U. S. C. 309 (b) did not require applicant to prove that there is a real need for the proposed service which cannot be met by existing carriers. The permit, so states *Section 209 (b)* shall be issued (no option allowed) to any qualified applicant when it appears the applicant is fit, willing and able to properly perform contract carrier service. No one claims that applicant is not fit, willing and able to perform contract carrier service. The record shows the applicant to be fit, willing and able to perform contract carrier service. Obviously, the Commission, in denying the application of appellant, acted contrary to law and its order is unlawful and must be set aside.

We hasten to point out that we did not state the further requirement of the Act which is that the proposed operation, to the extent authorized, will be consistent with the public interest and the National Transportation Policy. We shall now discuss public interest.

THE MEANING OF CONSISTENT WITH PUBLIC INTEREST.

Please bear in mind that the Commission held that the burden of proof was upon applicant to show that there is a real need for the proposed service which cannot be met by existing carriers. In so holding, the Commission placed upon the statutory requirement "consistent with the public interest" an unlawful interpretation of that phrase and an interpretation contrary to its own interpretation as follows:

> "In determining the question of consistency with the public interest, it is essential that we form some conception of the meaning of that phrase as used in the statute. The phrase is used in several places in the Act. In section 213, it is used in contrast with the phrase "promote the public interest". It follows from this use that its true meaning is that of "not contradictory or hostile to the public interest". Such decisions as we have been able to find support this interpretation of the phrase. They are as follows:
>
> *"State v. Superior Court, 126 Pac. 920; Ryan v. Roach Drug Co., 239 Pac. 912; Baldwin-Heckes Co. v. Kammerlohr, 242 N. W. 661; Shay v. Roth, 221 Pac. 967, 969; In re North Terrace Park, 48 S. W. 860, 863; Swan v. United States, 9 Pac, 931, 933; Borough of Oakland v. Board of Conservation, 118 Atl. 787, 788; Canellos v. Zolalis, 177 N. W. 133, 135; Electric Public Utilities Co. v. West, 140 Atl. 840.*
>
> "With this conception of the meaning of the phrase, we are of the opinion that the proposed operations are not hostile to the public interest and that in point of fact by rendering more flexible the rendition of the proposed service and affecting economies

> both in time and money, the public will ultimately receive benefit from the rendition of them by this carrier. We find that the statutory requirements have been met." *Scott Bros., Inc. 2 M. C. C. 155 (164).*

In this proceeding, the Commission held "consistent with the public interest" to mean that the service proposed is not that of a contract carrier and that since only common carrier service is now available, that a grant of the application will not be consistent with the public interest. But in *2 M. C. C. 155 (164)* after great search, the Commission found the statutory meaning of "consistent with the public interest" to be "not contradictory or hostile to the public interest." In fact, even if the contract carriers' service is unfavorable to the common carriers, still it must be granted because the commission said:

> "There is nothing inconsistent with the public interest in providing the public with improved service even if it should have an unfavorable effect on the revenue of protestants." *Trans-American Freight Lines Purchase Harold D. Gorman, 5 M. C. C. 712 (713).*

The record shows that there is no contract carrier passenger service available; that the service of existing common carriers is not as satisfactory as that of applicant and that the law specifically prohibits common carriers of passengers from conducting contract carrier service, the kind of service the Commission defines as in reality only a form of private carriage.

It is crystal clear from the statute and from the decisions of the Commission that there is a great difference in service between that rendered by a common carrier of passengers and that rendered by a contract carrier of passengers and that the transportation by common carriers of special or

chartered parties is only the equivalent of contract carrier service but is not, in law or fact, contract carrier service. Consequently, there is no contract carrier service available and since the statute provides for contract carrier passenger service, the absence of that service makes the denial of the application of appellant contrary to law and the National Transportation Policy.

EXEMPTION UNDER (9) OF 49 U. S. C. 303

The appellees contend that the intrastate operation of appellant puts him not within the provisions of *Exemption (9), of 49 U. S. 303.*

The Interstate Commerce Act has no application over operations conducted by any person solely within a single state, *49 U. S. C. 302(b)*, as that provision provides that nothing in the Motor Carrier Act shall be construed to interfere with the exclusive exercise by each state of the power of regulation of intrastate commerce by motor carriers on the highways thereof. The holding that appellant because he is operating for the State of Virginia in transporting school children to and from school, is engaged in transportation as a regular occupation or business, is a direct interference with the exercise by the State of the power of regulation of intrastate commerce. The operation of the appellant in transporting school children is done under the wing of the State and for the State. The Commonwealth of Virginia, if it was actually and physically transporting the school children in its own buses, no one could say that such operation is a regular occupation or business of the State. Consequently, when an agent performs a duty for a principal, the agent's authority can never rise higher than that of his principal. The principal being exempt from conducting transportation as a regular occupation or business, the agent is likewise exempt. In law, therefore, the casual, occasional or reciprocal trips made by appellant in transporting passengers to points beyond the state line fall squarely within the provisions of *49 U. S. C.*

303 (21) (b) (9), exempting such operation from the regulation of the Commission except the safety and hours and wage provisions of the Act.

CONCLUSION

The issues in this proceeding are so substantial as to require plenary consideration, with further briefs on the merits, and oral argument for their resolution. The motions of the appellees, the jurisdictional statement and this answer to the motion show also that the issues are substantial, which issue require determination on their merits by the Court.

The motions to affirm should be overruled and the relief sought by appellant granted.

Respectfully submitted.
NORRIS EDWARD BASS

By: W. G. BURNETTE,
Council for Appellant

302 - 7th Street
P. O. Box 859
Lynchburg, Virginia
January 7, 1959

CERTIFICATE OF SERVICE

I hereby certify that I have this 7th day of January, 1959, served a copy of the foregoing Answer of Appellant to the Motion to Affirm filed by Appellees upon the counsel of record as listed below by first class U. S. Mail, with postage prepaid and addressed as follows:

Honorable John Strickler
United States Attorney
Western District of Virginia
Roanoke, Virginia

The Solicitor General
Department of Justice
Washington 25, D. C.

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Department of Justice
Washington 25, D. C.

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No. 528

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

NORRIS EDWARD BASS

dong business as

N. E. BASS,

APPELLANT

v.

UNITED STATES OF AMERICA

INTERSTATE COMMERCE COMMISSION, *ET AL*

PETITION OF APPELLANT FOR REHEARING

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UNITED STATES OF AMERICA
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PETITION OF APPELLANT FOR REHEARING

STATEMENT

Norris Edward Bass, pursuant to an Act of Congress, 49 U. S. C. 309, filed an application with the Interstate Commerce Commission for a permit authorizing him to engage in operation in interstate commerce as a contract carrier of passengers. The aforesaid application was filed in accordance with the rules and regulations prescribed by the Commission governing such application.

During the hearing of the application, the Atlantic Grey-

hound Corporation, Carolina Coach Company, Inc., Eastern Greyhound Lines, Richmond Greyhound Lines, Inc., and Virginia Stage Lines, all common carriers of passengers operating under certificates of public convenience and necessity issued by the Commission pursuant to 49 U. S. C. 306, entered an appearance and actively opposed the application, before the Commission and before the Court. These common carriers of passengers claim that they have an exclusive right, under the rules and regulations of the Commission made pursuant to 49 U. S. C. 308 (c), to render charter passenger service *and that no one else has the right to ever render contract carrier passenger service*, notwithstanding the fact that these common carriers can not render contract carrier service and that the statute specifically provides for contract carrier passenger service, 49 U. S. C. 309 (b).

It was appellant's view before the Commission and before the Court that although these common carriers of passengers by motor vehicle could render or perform chartered or special passenger service under their certificates, *that the application of appellant should, nevertheless, be granted as a matter of law because these common carriers could not, in fact or law, render or perform contract carrier passenger service*, because Congress provided that contract carrier passenger service should be performed by contract carriers under a permit. Consequently, if these common carriers are correct in their contention, then they have a monopoly in the transportation of passengers, which Congress did not give them. Congress did not permit these common carriers to perform contract carrier passenger service and their opposition is unwarranted. In fact, these common carriers can not render contract carrier passenger service and, if they can not render contract carrier passenger service, then it is unlawful to deny the application of appellant. In opposing the application of appellant, their position to do so, since they cannot render contract carrier passenger service, is no better than the posi-

tion the rail carriers took in Schaffer Transportation v. U. S., 355 U. S. 88, and in that case this Honorable Court struck down the position of the rail carriers as follows:

> "The Supreme Court, Mr. Chief Justice Warren, held that determination by the Interstate Commerce Commission in denying the application on ground that railroad's service presently available was reasonably adequate and that witnesses' main purposes in supporting the application was to obtain lower rates rather than improved service, was improper for failure to evaluate inherent advantages of motor service proposed."

It is clear from the above decision that the Commission was in error and *that the action of the District Court was plainly contrary to the decision of this Honorable Court and law.*

The Commission answered our contention in the following manner, to-wit:

> "The proposed service is not essentially different from that offered and afforded by the opposing motor common carriers."

Congress made it clear that a common carrier is any person which holds itself out to the *general public* to transport passengers for compensation, 49 U. S. C. 303 (14), and that a *contract carrier* is any person which, *under individual contracts or agreements,* transports passengers for compensation, 49 U. S. C. 303 (15). It is clear that there is a great legal difference between a common carrier and a contract carrier, even though the service rendered by each may be essentially the same. One legal difference between a common carrier of passengers rendering charter party service and a contract carrier of passengers rendering passenger service under a

contract is the source of the authority to render the service. No common carrier of passengers can render charter party service *as of a right*, but only at the pleasure of the Commission and under the rules and regulations fixed by the Commission, 49 U. S. C. 308 (c). Contract carriers, on the other hand, *have a right under the Act* to render contract carrier passenger service, 49 U. S. C. 309 (b). The Commission cannot, therefore, lawfully deny the application because the application must be granted if the proposed service is consistent with the public interest and the National Transportation Policy, 49 U. S. C. 309 (b). There is no contract carrier passenger service available, hence the granting of the application is consistent with the public interest and the National Transportation Policy. The denial of the application amounts to the perpetuation of a monopoly in transportation which the common carriers now enjoy and such monopoly is not in the public interest. Congress, provided for contract carrier passenger service, notwithstanding the fact that Congress had also provided for common carrier passenger service with the right of those common carriers to also render, under their certificates, special or chartered parties service. Congress specifically provided that the charter service of common carriers must be rendered under their certificates and that those same common carriers could not render charter service under a permit. Contract carrier service is to be rendered only under a contract by a contract carrier.

The Commission, by denying the application, has denied the public contract carrier passenger service simply because these opposing common carriers contend that they can render essentially the same service as a contract carrier. The public is entitled to contract carrier passenger service as distinguished from service which may be essentially the same as contract carrier service.

The District Court answered our contention that the

denial of the application for authority to render contract carrier passenger service was unlawful by saying:

> "However, we do not agree that the National Transportation Policy adopted by Congress legislated, as the plaintiff contends, that even though a particular type of charter service is made adequately available by common carriers the Commission must nevertheless authorize duplicate service," (contract carrier service and common carrier service are different under the Act, 49 U. S. C. 303 (14) (15) and are not duplicate services,) "whenever the same is tendered by contract carriers who are not common carriers. In other words, we do not believe that Congress in laying down its National Policy, meant that notwithstanding the existence of adequate contract charter service by common carriers," (common carriers cannot render contract carrier service under the provisions of 49 U. S. C. 303 (14) (15) nor does 49 U. S. C. 308(c) authorize common carriers to render contract carrier service,) "the Commission is still compelled to allow duplicate facilities to one who offers contract service exclusively." (J. S. 19 & 20)

It is clear that the District Court has not distinguished between the services possible by a common carrier and the services possible by a contract carrier under the Act. The Court considered the services of each to be the same. Congress made a difference and it is that difference we are trying here to have recognized and when it is, relief will be granted.

THE QUESTIONS

The questions involved in this proceeding, which we respectfully submit require a rehearing and a decision by this Honorable Court are:

(a) Did Congress mean that there shall be two kinds of passenger service, one kind rendered by a common carrier, 49 U. S. C. 303(14), and the other kind rendered by a contract carrier, 49 U. S. C. 303(15)?

(b) Did Congress mean, as the Commission has held, that when common carrier charter party passenger service is available, that contract carrier service of passengers shall not be authorized? And,

(c) Did Congress, by language used in 49 U. S. C. 303(14) (15) and 49 U. S. C. 306 and 49 U. S. C. 309, mean to separate a common carrier of passengers and a contract carrier of passengers or did Congress mean that only common carrier passenger service, as the Commission has held, is available to the public?

ENLARGEMENT OF TIME

The opposing parties filed motions to affirm the judgment of the District Court and those motions were granted by this Honorable Court on January 26, 1959.

The enlargement of time from February 20 to March 20 in which to file petition for rehearing was granted on February 20, 1959, and the parties hereto were so notified thereof by counsel for appellant by sending a copy of the order enlarging the time to each party.

ARGUMENT

If Congress meant, as the opposing common carriers contend and the Commission and the District Court have held, that there is no difference between the services of a common

carrier charter passenger service and a contract carrier passenger service, then there would have been no need for the provisions of 49 U. S. C. 309(b). If, on the other hand, Congress meant that there was a difference between the two services, then that difference has been struck down by administrative discretion and sanctioned by judicial action. If the specific language used by Congress in giving the public also contract carrier passenger service does not apply here, then our relief, if any, must come from Congress.

The opposing common carriers by motor vehicle would have the application denied because a denial would force the public to accept the service of those common carriers regardless of the adequacy or inadequacy of their service. Congress decreed otherwise. These common carriers enjoy a monopoly in passenger service and anything which interferes with that monopoly is contrary to the wishes of these common carriers. Notwithstanding the common carrier charter party service, Congress did also provide that the public shall have contract carrier passenger service. Shall the public have contract carrier passenger service, 49 U. S. C. 309(b), or must the public be denied contract carrier passenger service, is the question we leave for this Honorable Court to decide.

The view that you can see from the top of a hill is not the same view that you can see from a cave or the bottom of a valley. Two can look at the same thing and not see the same object at all. This difference in their viewpoint is accounted for by the place the viewer stands.

We stand at the place where we see that the Act provides for the services of a contract carrier of passengers and where we see that the application of appellant should have been granted. The opposing common carriers stand at a place where they see the opposite. We, therefore, appeal to this Honorable Court to take another look at the record before the Court in this proceeding and examine the provisions of

the Interstate Commerce Act to which we have directed attention and then grant a rehearing and the relief sought by appellant, and we so pray.

NORRIS EDWARD BASS

By: W. G. BURNETTE
Counsel for Appellant

302 7th Street
P. O. Box 859
Lynchburg, Virginia
March 17, 1959

CERTIFICATE OF SERVICE

I, W. G. Burnette, counsel for Norris Edward Bass, doing business as N. E. Bass, Gladys, Virginia, appellant herein, and a member of the Bar of the Supreme Court of the United States, having been admitted to practice on the 13th day of February, 1947, hereby certify that on the 17th day of March, 1959, I served copies of the foregoing Petition of Appellant for Rehearing upon this court and upon the several parties of record in the District Court as follows:

1. On the United States, by mailing a copy in a duly addressed envelope, with postage prepaid, to:

Honorable John Strickler
United States Attorney
Western District of Virginia
Roanoke, Virginia.

The Solicitor General
Department of Justice
Washington 25, D. C.

Honorable Victor R. Hansen
Assistant Attorney General
Department of Justice
Washington 25, D. C.

James E. Kilday, Esq., Attorney
Department of Justice
Washington 25, D. C., and

E. Riggs McConnell, Esq., Attorney
Department of Justice
Washington 25, D. C.

2. On the Interstate Commerce C nmission, by mailing a copy in a duly addressed envelope, with postage prepaid, to:

Honorable Robert W. Ginnane
Chief Counsel
Interstate Commerce Commission
Washington 25, D. C., and

Carroll T. Prince, Jr., Esq., Attorney
Interstate Commerce Commission
Washington 25, D. C.

3. On Atlantic Greyhound Corporation, Carolina Coach Company, Eastern Greyhound Lines, Richmond Greyhound Lines, Inc., and Virginia Stage Lines, Inc., intervening defendants, by mailing copies in duly addressed envelopes with first class postage prepaid, to their respective attorneys of record as follows:

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